LAM TEIK KAI v. HALLAM NOMINEES LTD. & ORS.

[O.C.J. (Abdul Hamid J.) September 25, 1970]

[Kuala Lumpur — Civil Suit No. 1545 of 1966]

Companies — Shares — Alleged conversion of shares — Shares registered in name of defendant company but transfer receipts and executed transfers issued to plaintiff — Share certificates subsequently issued to different persons — No proof of wrongful act on part of defendant company — Insufficient evidence of conversion.

Tort — Conversion — Damages for alleged conversion of shares.

Sharebrokers — Conversion of shares — Liability.

The plaintiff had instructed the defendant company to buy 1,000 Malayan Tin Dredging shares. The shares were bought and registered in the name of the defendant company. Subsequently transfer receipts for 1,000 shares were issued to the plaintiff together with executed transfers. The plaintiff deposited all the transfer receipts together with the executed transfers with the Overseas Chinese Banking Corporation. Later he instructed the bank to exchange these for share certificates. Certificates for 500 shares were given but not for the other 500 shares, as it appeared that the certificates for them had already been issued to the defendant company and the shares had been transferred to three other persons. On the evidence there was nothing to show any positive wrongful act on the part of the defendant. The plaintiff relied on the fact that the defendant company's name appeared as transferors of the 500 shares.

Held: the plaintiff had not adduced evidence sufficient for the court to hold on the balance of probabilities that the defendants were liable for conversion and the claim must therefore be dismissed.

Cases referred to:-

(1) *Hollins & Ors.* v. *Fowler & Ors.* (1874) L.R. 7 H.L. 757 at p. 766.

(2) *Oakley* v. *Lyster* [1931] 1 K.B. 148 at p. 153.

(3) *Maneckji* v. *Wadilal & Co.* A..R. 1926 P.C. 38.

CIVIL SUIT.

Joseph Lai for the plaintiff.

Eugene Lye for the defendants.

Cur. Adv. Vult.

Abdul Hamid J.: The plaintiff's claim is for damages alleging that the defendants wrongfully deprived the plaintiff of the share certificates in respect of 500 shares in Malayan Tin Dredging Ltd. the property of plaintiff by converting the same to their own use.

Alternatively the plaintiff claims a total sum of $9,148.98 being money had and received by the defendants to and for the use of the plaintiff.

The plaintiff is a businessman and the defendants are the directors of Hallam Nominees — the defendant company.

The plaintiff stated in his evidence that in 1961, he instructed the defendant company to buy 1,000 Malayan Tin Dredging shares. A contract note (P. 1) was issued and payment for the shares was made. Subsequently transfer receipts for 1,000 shares were issued to him together with executed transfers. He deposited all the transfer receipts together with executed transfers with Overseas Chinese Banking Corporation for overdraft facilities. In March, 1965, he instructed the bank to exchange these for share certificates. The bank forwarded the transfer receipts to London and received through Midland Bank certificates for 500 shares. Certificates for the other 500 shares contained in P. 2 were not exchanged for the reason that they had already been issued. According to the plaintiff, the certificates for these 500 shares were issued to the defendant company and these shares were transferred to three other persons. The plaintiff further stated that dividends in respect of 1,000 shares were paid regularly until January 1966 after which date dividends in respect of 500 shares — the subject matter of this claim — were stopped.

Mr. Hoh Su Tiang, (D.W. 1) a director of the defendant company gave evidence for the defendants. He testified that in July, 1961 he was a junior partner of Hallam & Co. which had a nominee company called Hallam Nominees. The purpose of the nominee company is to enable shares to be registered in the name of the nominee and for convenience of claiming dividends and also to save registration fees. On instruction of the plaintiff, shares were bought through the defendant company on AIS contract (arrival including stamps). The shares were in the name of the defendant company but the transfer receipts and executed transfers were delivered to the plaintiff after they were received from L. Powell & Sons, the London brokers who were instructed by the defendant company to buy Malayan Tin Dredging shares. These were London shares.

D.W. 1 further stated that insofar as the defendant company was concerned, the transaction was completed after the transfer receipts and executed transfers were handed to the plaintiff. Some time in 1964/5, the old transfer forms of the London registered companies were to be replaced and the plaintiff was issued with new executed transfer forms in respect of the transfer receipts held by him.

It is the defendants' case that although the name on the London register would still be in the name of the defendant company, these shares were no longer owned by them, since the plaintiff as the owner of P. 2 was free either to exchange these at any time for share certificates or transact a sale of the shares.

Referring to the plaintiff's allegation that these shares were transferred to three other persons, D.W. 1 said that though the defendant company's name appear as transferors (P. 6 page 75), the numbers of share certificates had not been written by them but by Strauss and Turnbull, a selling brokers in London. The defendant company was not aware of these certificates or any transaction dealing with these certificates until they were informed on 8th July 1965, and even then they did not know that these certificates relate to P. 2. D.W. 1 explained that after transfer receipts and executed transfers were issued to the buyer, they no longer knew who owned what transfer receipts and which transfer receipts had been exchanged for share certificates, not until 8th July 1965 when Malayan Tin Dredging furnished them with details. Moreover in respect of these shares, though registered in their name, the certificates were not sent to them.

Mr. Joseph Lai, counsel for the plaintiff, submitted that the defendant company, a nominee company, was liable for conversion in the case. It is contended that the defendant company did an act to assert a right inconsistent with the owner's right by executing the transfers in respect of 500 shares. Referring to the evidence of Mr. Harvey, whose deposition was taken in London at the request of the plaintiff, he submitted that the evidence establishes conversion by the defendant company. Mr. Harvey said that he was doing the registration of shares for Malayan Tin Dredging until March, 1965. The register contains reference to transfer of 1,000 shares to the defendant company on 10th August 1961 and transfer receipts were issued to a broker in London — L. Powell & Sons. According to him, it is stated in the transfer receipts that —

"In the absence of instructions to the contrary the certificate in respect of the above transfer(s) will be despatched by ordinary post at the risk of the transferee in exchange for this receipt which should be lodged on or after 20.10.61."

Mr. Harvey emphasised that the dredging company would not issue the share certificates except against production of transfer receipts. Where the relevant transfer receipts were not produced, certificates would be issued on the signing of a letter of indemnity.

Referring to certificates numbered 21812-21816, Mr. Harvey testified that he examined thoroughly the records of the issue of share certificates without presentation of transfer receipts to see whether any share certificates numbered 21812 to 21816 had been issued before 31st March 1965. He found that such certificates had not been issued.

Mr. Harvey also testified that he knew of two cases which suggest that records had not been accurately kept of the issue of share certificates in Malayan Tin Dredging. Referring to the practice of issuing share certificates, he said that it was customary to deal with agents or sharebrokers. In this particular case, it was L. Powell & Sons. Usually the agent writes to the company stating that transfer receipts are lost and the company issues a letter of indemnity to be signed. On the strength of this letter of indemnity, the certificate would be issued to the agent.

According to Mr. Harvey, a few days after 31st March 1965, it was discovered that the share certificates numbered 21812-21816 were missing. They tried to discover why those certificates were not available and they segregated every cancelled transfer receipt that had been issued to Hallam Nominees and all the returned share certificates in the name of Hallam Nominees but they could not find how the certificates in question left the office.

In the light of Mr. Harvey's evidence, I am unable to hold that there is sufficient evidence to establish conversion on the part of the defendant company.

Mr. Harvey clearly stated that he was unable to explain how the certificates in question left the Tin Dredging Office in London and there was nothing to show that L. Powell & Sons, through whom the defendant company bought the shares for the plaintiff, gave a letter of indemnity for the issue of share certificates on behalf of the defendant company.

The fact that the defendant company appeared as transferors by itself is not sufficient, to my mind, to show that they converted these shares to their own use. There was nothing to indicate that they had at any time these share certificates in their possession; or that they instructed Strauss & Turnbull to sell these shares for them. It is of course true that there is no conclusive evidence to show how the transfer forms signed by the defendant company could be in the hands of Strauss & Sons. But to my mind, it is not reasonable to expect the defendant company to provide any conclusive explanation. It is in evidence that the defendant company had issued many executed blank transfers to holders of London shares and it is possible for a person in possession of the share certificates to transact a sale if he could get hold of these blank executed transfers. It is not, however, for this court to speculate. Evidently there is nothing to show that the defendant company had possession of these certificates and furthermore there was no evidence whatever to show that the defendant company received payment for the transfer of these shares. *Halsbury's*, Vol. 38, 3rd edition p. 776, dealing with "Sale and other disposition"s states —

"A wrongful sale of the goods of another person, if accompanied by delivery of the goods, or documents of title, amounts to conversion, and both the seller and the buyer are liable to be sued...."

In the present case, there was no evidence to show that the defendant company delivered the share certificates to Strauss & Turnbull.

"To constitute conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights, and an intention in so doing to deny the owner's rights or to assert a right inconsistent with them." (*Halsbury's*, Vol. 38, 3rd. edition, p. 775/6).

In the instant case, on the evidence before the court, there is clearly nothing to show any positive wrongful act on the part of the defendant company.

Mr. Eugene Lye, counsel for the defendants, in his submission referred to *Francis Hollins & Others* v. *George Fowler & Ors.*,[1] also the case of *Oakley* v. *Lyster*[2] where Scrutton L.J. said —

"I take the modern definition of conversion from the judgment of Atkin J. in *Lancashire and Yorkshire Ry. Co.* v. *MacNicoll* where he said: 'it appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right.' Mr. Bensely Wells argued that there can be no conversion if the defendant is not in possession of the thing alleged to have been converted, and he cited in support of that proposition *England* v. *Cowley* but in that case I find Kelly C.B. saying this: 'Apart from mere *dicta*, no case, so far as I am aware, can be found where a man not in possession of the property has been held liable in trover unless he has absolutely denied the plaintiff's right.' "

Mr. Eugene Lye also submitted that the contract between the plaintiff and the defendant company was completed after the delivery to the plaintiff of the transfer receipts accompanied by the blank transfers. [See Vol. 6 *Halsbury's*, 3rd edition p. 248 under "Seller's obligation"; and *Maneckji* v. *Wadilal & Co.*[3]].

In my judgment, the circumstances of this particular case do not warrant a finding by this court that there had been a positive wrongful act of dealing with the plaintiff's shares in a manner inconsistent with the plaintiff's rights. The burden of proof, I think, lies with the plaintiff and the court is not satisfied that he has adduced evidence sufficient for this court to hold, on the balance of probabilities, that the defendants are liable for conversion.

For these reasons I dismiss the claim with costs.

Claim dismissed.

Solicitors: *Allen & Gledhill; Eugene Lye & Co.*

NG KIM LEK v. WEE HOCK CHYE

[A.C.J. (Syed Agil Barakbah J.) September 30, 1970]

[Seremban — Civil Appeal No. 3 of 1970]

Bills of Exchange — Claim on cheques — Holder in due course — Whether plaintiff took cheques in good faith — Notice of dishonour — Whether due presentment essential — Bills of Exchange Ordinance, 1949, ss. 29, 31, 48, 49, 55 and 90.

The plaintiff claimed, *inter alia,* (1) the sum of $300 in respect of a cash cheque drawn on the Hongkong and Shanghai Banking Corporation which at the request of the defendant was not presented for payment but had not been redeemed or at all; (2) the sum of $501.30 in respect of a cash cheque drawn on the Malaysian Banking Ltd. which was presented for payment but was dishonoured. The claim was dismissed by the learned magistrate and the appellant appealed.

Held: allowing the appeal: (1) the plaintiff was a holder in due course of the cheque and on the facts had paid value for them and had taken them in good faith and without notice of any defect in the title of the defendant;

(2) although no notice of dishonour had been given in respect of the second cheque, such notice had been waived by implication;

(3) as the first cheque had not been presented at the request of the defendant, the plaintiff was not precluded from suing on it;

(4) on the facts the plaintiff was entitled to judgment for the amount of the cheques.

Cases referred to:-

(1) *Mercantile Bank Ltd., Ipoh* v. *Yoon Siew Kang* [1969] 1 M.L.J. 174.

(2) *Swan* v. *The North British Australasian Co.* (1863) 159 E.R. 73; 2 H. & C. 175.

(3) *Jones* v. *Gordon* (1877) 2 App. Cas. 616.

(4) *Mohamed Amirdin* v. *Varatharajan* [1968] 2 M.L.J. 83.

CIVIL APPEAL.

Atma Singh Gill for the appellant.

P. S. Maniam for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an appeal by the appellant (plaintiff in the court below) against the decision of the learned magistrate, Seremban, who gave judgment in favour of the respondent (defendant in the court below) with costs.

The plaintiff's claim against the defendant was for the sum of $947.30 made up as follows: —

(a) The sum of $300 in respect of a cash cheque No. C. 875944 drawn on the Hongkong & Shanghai Banking Corporation Ltd., Malacca dated 4th September, 1964, which, at the request of the defendant was not presented for payment but has not been redeemed or at all. (Ex. P1).

(b) The sum of $501.30 in respect of another cash cheque No. 165150 drawn on the Malayan Banking Ltd., dated 18th November, 1964, which was presented for payment but was dishonoured. (Ex. P2).

(c) The sum of $146 being the price of 100 lbs. of frozen chicken wings supplied to the defendant at his written request on 5th September, 1963, (Ex. P3) and accepted by the defendant.

Mr. Atma Singh Gill appeared for the appellant and Mr. P. S. Maniam for the respondent

During the hearing of the appeal Mr. Atma Singh conceded to the decision of the learned magistrate regarding the 100 lbs. of chicken wings, *i.e.* item (c) above. The two items left to be considered were the two cheques (Ex. P1 and P2). The learned magistrate in his grounds of decision relied purely on the facts adduced during the proceeding. He had however failed to consider the legal issues involved relating to the two cheques.

The main ground of appeal was that the learned magistrate was wrong in law and in fact in considering matters which were irrelevant to the main issues in question, when considering the alteration of the date in Ex. P1 in the face of the admission by the respondent who had given evidence that he was responsible for the transactions involving Ex. P1 and P2, the subject matter of the suit. The other remaining grounds were based on the finding of facts by the learned magistrate with which after perusal of the relevant notes of proceedings and grounds of decision, I have no cause to quarrel.

Now, with regard to the main ground of appeal, it is apparent that the two cheques Ex. P1 and P2 are bills of exchange and are therefore governed by the provisions of the Bills of Exchange Ordinance, 1949. (section 73). The relevant provisions of the Ordinance applicable are discussed at great length by Suffian F.J. in the Federal Court in *Mercantile Bank Ltd. Ipoh* v. *Yoon Siew Kang.*[1] I would summarise them as follows: —

A bill payable to bearer as is the case with P1 and P2 is negotiated by delivery. (section 31(2)). The facts showed that the two cheques were issued by the defendant who passed it to P.W. 2 who in turn delivered them to the plaintiff. By such delivery, the plaintiff claims he was holder in due course. A holder in due course is a holder who has taken a bill, complete and regular on the face of it, provided that (a) he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; (b) that he took the bill in good faith and for value, and that at the time the bill was